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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 1095

JERRY J. ACUFF, GARNER E. ALLEN, GEORGE J. BULLOCK, CORBETTE W. CARLISLE, C. L. CARTER, DONALD W. CARTER, GEORGE W. DEAN, DEWEY R. FAIRCLOTH, M. T. FRAZIER, A. J. GIDDENS, BOBBY HARVISON, CHARLES W. HAYS, JIMMY D. HESTER, MIKE KITTRELL, T. W. KITTRELL, PHILLIP LEE, ROBERT S. MCCOY, HERBERT RAY MEITZLER, D. W. NARAMORE, WILLIAM I. PLATT, A. C. PUGH, JR., JAMES W. RICHARDSON, L. T. ROBBINS, J. I. RUSSELL, CHARLES W. SCHULER, B. R. SINGLETARY, R. C. SKIDMORE, DONALD L. WARD, J. D. WHITMAN, BOBBY N. WHITTEN, WILLIAM A. WINTERS,

Petitioners,

v.

UNITED PAPERMAKERS AND PAPERWORKERS, AFL-CIO; INTERNATIONAL BROTHERHOOD OF PULP, SULPHITE AND PAPERMILL WORKERS, AFL-CIO; and SCOTT PAPER COMPANY, SOUTHERN DIVISION,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No.

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OPINION BELOW

The Opinion of the Court of Appeals is reported at 404 F.2d 169 (1968); it is appended hereto at pp. 1a-5a. The District Court did not render an opinion.

JURISDICTION

The Court of Appeals for the Fifth Circuit entered its opinion and judgment on ~~December~~ NOV 27, 1968. The jurisdiction of this Court is conferred by 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. May an arbitrator deny to employees, covered by a collective bargaining agreement, representation by their retained, ready, willing, and able counsel, thereby forcing them to accept representation by unions' counsel, in arbitration proceedings at which their jobs are at stake, and the union arguably has an interest conflicting with that of the employees, conformably with the first amendment and the due process clause of the fifth amendment of the Constitution of the United States, the United States Arbitration Act § 10, 9 U.S.C. § 10, and the principles of federal labor law?

2. May a United States District Court, under the circumstances and conformably with the authorities set forth in Question one, deny a motion by the employees to intervene in a pending case (under the auspices of which case the arbitration was held) without a hearing or otherwise receiving evidence on the employees' allegations of inadequate representation by the union through its counsel?

3. May a Court of Appeals, in affirming the District Court, under the circumstances and conformably with the authorities set forth in Questions one and two, find that union representation was in fact adequate when the record contains only, insofar as is pertinent to this determination (and other than the employees' conclusionary allegation of inadequacy), the unions' original complaint to compel arbitration and the arbitrator's decision, neither of which deal with this question?

Constitutional and Statutory Provisions Involved

The first amendment and the due process clause of the fifth amendment of the Constitution of the United States are appended at p. 6a.

United States Arbitration Act § 10, 9 U.S.C. § 10, and the National Labor Relations Act, § 9(a), 29 U.S.C. § 159 (a) are appended at pp. 6a-7a.

STATEMENT OF THE CASE

During November, 1966, an unauthorized work stoppage occurred at the plant of respondent Scott Paper Company (the "Company"). (R. 24) Sixty-three employees were subsequently discharged by the Company (R. 26). On February 8, 1967 the original complaint herein (R. 1-13) was filed by the respondent Unions against the Company seeking arbitration of the grievances of the discharged employees. Pursuant to stipulation between the Unions and the Company (R. 14-16) the court ordered arbitration of the disputes and retained jurisdiction (R. 17).

At the arbitration proceedings the petitioners herein (the "Employees") filed oral and written motions with the arbitrator to be represented by counsel of their choice, but the motions were denied and only the Unions' counsel was allowed to represent them. (R. 19, 62) The arbitration, by award dated August 17, 1969, resulted in the reinstatement without back pay of all but sixteen of the grievants. (R. 55)

As shown by the absence thereof from the record neither the Unions nor the Company initiated any further proceedings in the district court, *i.e.*, review of the arbitrator's award was not sought. On November 14, 1967, after ample time had passed to allow the Unions to seek review in the district courts of the arbitration award, the sixteen employees (fifteen of whom are petitioners here) who were not awarded reinstatement filed a "Motion to Intervene as Plaintiffs" accompanied by an "Intervenor's Complaint and

Motion for Vacation in Part of Arbitration Award." (R. 18-20) On the next day seventeen (sixteen of whom are petitioners here) of those who were reinstated without back pay filed a similar motion and complaint. (R. 60-62) Both motions alleged that intervention was proper under Fed. R. Civ. P. 24(a)(2)[1] and that their interests "have not and may continue to be inadequately represented by the present plaintiffs . . ." (R. 18, 60). Both complaints asserted jurisdiction based on the United States Arbitration Act § 10, 9 U.S.C. § 10 (jurisdiction having already been acquired by the original complaint's assertion of the Labor Management Relations Act § 301, 29 U.S.C. § 185); alleged their denial of right to be represented by special counsel at the arbitration proceedings despite timely assertion thereof; incorporated the arbitrator's decision (R. 21-60); and sought vacation thereof. (R. 19-20, 61-62)

The motions to intervene were denied without opinion by order dated January 31, 1968 (R. 63).

The collective bargaining agreement between the Company and the Union contains a no-strike clause which includes the following:

> In the event of any interruption of work the Union shall forthwith do eveything within its power to secure the immediate return of the employees to work. (R. 30)

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[1] In the Court of Appeals the question of the right to intervene was treated separately; the substantive decision of the court that petitioners were not entitled to counsel of their choice effectively disposed of the question of the right to intervene; hence said question, being thereby necessarily comprised within the substantive questions, is not separately dealt with herein.

REASONS FOR GRANTING THE WRIT

I.

CERTIORARI SHOULD BE GRANTED TO CONSIDER WHETHER THE DUE PROCESS CONSIDERATIONS OF THIS COURT'S INTERPRETATION OF THE UNITED STATES ARBITRATION ACT, ANNOUNCED IN *COMMONWEALTH COATINGS CORP. V. CONTINENTAL CASUALTY CO.*, 89 S. CT. 337 (1968), APPLY WITH REGARD TO COUNSEL IN A LABOR ARBITRATION PROCEEDING.

If a man has a lawyer, he has a right to be represented by that lawyer.

> "If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and therefore of *due process* in the constitutional sense." *Powell v. Alabama*, 287 U.S. 45, 69 (1932).

Cf. Corfield v. Coryell, 6 F. Cas. 546, 552 (No. 3230) (C.C. E.D. Pa. 1823) (fundamental privilege and immunity in a state court "to institute and *maintain action* . . ." (emphasis added).)

The Court is urged to grant certiorari and take this opportunity to make explicit the right of a person, in an arbitration proceeding, to be represented by his retained counsel.

Given the indisputable premise that there are strong due process considerations when a man retains a member of the bar to represent him in a trial atmosphere before a tribunal having power over his livelihood, the entire foundation of *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 89 S. Ct. 337 (1968) applies here. This right, too, is so elementary as to be "taken for granted in every judicial proceeding . . .", 89 S. Ct. at 338; the lawyer's partiality is as important as the judge's "impartiality" *Id.*

Here the governing principles of the federal labor law of employee-union relations[2] generally and the portion of the widely-used no-strike clause (quoted *supra*, p. 4) in particular create as great a possibility of bias or conflict of interest[3] on the part of counsel as the payments which "were a very small part of [the arbitrator's] income * * *" 89 S. Ct. at 339 (quoting the Court of Appeals' opinion, 382 F.2d at 1011).[4]

Here the statutory basis for invocation of due process principles is equivalent; if the arbitrator's business interests required vacation of the award under the United States Arbitration Act §§ 10(a)[5] and 10(b),[6] then §§ 10(c)[7] and 10 (d)[8] require it where the arbitrator refused to even hear the Employees' chosen counsel. He thereby foreclosed the hearing of the evidence counsel may have chosen to present,

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[2]As the court below phrased it, "to some extent the interests of particular individuals are subordinated to the interests of the group. . ." (3a). This concept has been expressed by this Court, but *cf.* Elgin J.&E. Ry. v. Burley, 325 U.S. 711, 733-34 (1945), *aff'd on rehearing*, 327 U.S. 661 (1946). Here the individual interests have been subordinated to a greater extent than the rationale of this statement calls for.

[3]Aspects of this conflict are discussed *infra*, p. ~~10a-11a~~ 10-11.

[4]Cf. ABA CANONS OF PROFESSIONAL ETHICS NO. 6 (conflicting interests).

[5]". . . corruption, fraud, or undue means." 9 U.S.C. § 10(a).

[6]". . . evident partiality or corruption in the arbitrators . . ." 9 U.S.C. § 10(b).

[7]"Where the arbitrators were guilty of misconduct. . . . in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced." 9 U.S.C. § 10(c).

[8]"Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made." 9 U.S.C. § 10(d).

and prejudiced the Employees' right to have their cases managed by their chosen advocate–in short, the arbitrator "imperfectly executed" his powers so that the award lacked mutuality.

Commonwealth Coatings noted "a *constitutional* principle" involved and found the same concept in the Arbitration Act, 89 S. Ct. at 339. It is thus of no moment that it is the Unions and not the Employees who are the nominal complaining parties;[9] obviously the Employees are the real parties in interest and any exaltation of the style of the action over substance is out of place in a constitutional context.

A showing of actual prejudice is not customarily required where notions of fundamental fairness have been transgressed, see, *e.g.*, *Commonwealth Coatings; Chandler v. Fretag*, 348 U.S. 3 (1954); *Powell v. Alabama*, 287 U.S. 45, 50 (1932) ("unnecessary to discuss the facts of the case . . ."). Employees contend that the right to their retained counsel is so fundamental that no prejudice need be shown to vacate the award that ensued after the denial of the right. *Cf. NAACP v. Button*, 371 U.S. 415, 432 (1963) ("possible applications of the statute in other factual contexts"). Alternately they contend that, actual prejudice having been alleged (R. 18, 60), the case should be remanded to the district court for proof (the court denied the motion to intervene without receiving evidence or responsive pleadings). In most areas the alternative contention would not be necessary, but the choice between the contentions merits consideration by this Court because of "the unique role played by the duty of fair representation doctrine in the scheme of

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[9]The Court of Appeals recognized this principle simply as the proper interpretation of the Federal Rules of Civil Procedure but then, in the very next sentence, reverted to overly technical construction of the pleadings against the Employees by objecting to inclusion of their allegation of prejudice in their motion rather than their complaint attached thereto. (2a-3a n. 2).

federal labor laws." *Vaca v. Sipes*, 386 U.S. 171, 188 (1967).

The position of counsel in an arbitration proceeding is on a par with that of an arbitrator for the same reasons stated in *Commonwealth Coatings*—*e.g.*, the proceeding is largely insulated from appellate review. See 89 S. Ct. at 339. If the parties are to truly be "the architects of their own arbitration . . .", 89 S. Ct. at 340 (White, J. concurring) they must be able to use their own counsel.

II.

CERTIORARI SHOULD BE GRANTED TO CONSIDER THE "OTHER SIDE OF THE COIN" OF *UNITED MINE WORKERS v. ILLINOIS STATE BAR ASSOCIATION*, 389 U.S. 217 (1967) AND *BROTHERHOOD OF RAILROAD TRAINMEN v. VIRGINIA*, 377 U.S. 1 (1964).

The thirty-one Employees here merely seek to "join together and assist one another in the assertion of their legal rights by collectively hiring an attorney to handle their claims." *United Mine Workers v. Illinois State Bar Ass'n*, 389 U.S. 217, 221 (1967). This is a protected first amendment right. *Id.*

It is anomalous that organized labor, having invoked the aid of this court to take the lead in providing counsel on a reliable and economical basis, should involve itself in attempting to dictate the choice of counsel when the Unions' own interests are at issue. This smacks too much of what the opposition in *United Mine Workers* and *Railroad Trainmen* professed (spuriously, it seemed) to fear. At any rate, a decision in the Employees' favor here would make explicit the symmetry envisaged by these two cases[10]—having assured adequate representation to many who would otherwise not receive it, legal representation must not be confined to a rigid mold. In *United Mine Workers* the factual

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[10] As well as *NAACP v. Button*, 371 U.S. 415 (1963).

context was different but the message was fundamental: "The members may employ other counsel if they desire . . . ." 389 U.S. at 220.

III.

CERTIORARI SHOULD BE GRANTED TO CONSIDER THE EFFECT OF CASES SUCH AS *VACA v. SIPES*, 386 U.S. 171 (1967) ON PROCEEDINGS SUBSEQUENT GRIEVANCE HANDLING AND TO ENUNCIATE THE SUBSTANTIVE PRINCIPLES OF FEDERAL LABOR LAW IN AN AREA NOT PREVIOUSLY DEALT WITH BY THIS COURT.

The Court of Appeals considered the principles of fair representation discussed in *Vaca v. Sipes*, 386 U.S. 171 (1967) to be controlling; Employees agree but contend that the application of the reasoning upon which they are founded leads to the opposite result from that reached below. *Vaca* and *Republic Steel Corp. v. Maddox*, 379 U.S. 650 (1965) (as well as *Local 12, United Rubber Workers v. NLRB*, 368 F.2d 12 (5th Cir. 1966), *cert. denied*, 389 U.S. 387 (1967), relied on below) considered the assailability of the union's handling of the grievance mechanisms prior to arbitration. As detailed at length in *Vaca*, see 386 U.S. at 191-92, many reasons exist for giving the union considerable leeway at this stage.[11] But once the union has carried through the grievance procedures, determined that arbitration is appropriate, the arbitrator has been selected, and the arbitration hearing convened, then the reasons for the strictures on the employee participation dis-

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[11] *E.g.*, the dispassionate union will more likely be able to settle short of arbitration, frivolous grievances are weeded out, consistency, spotting major problem areas in the contract, maintenance of confidence by the comapny and the employees in the union, avoidance of the vagaries of unsystematic negotiation, keeping the number of arbitrations (and hence the cost) down, preventing harassment by litigiously inclined employees, requiring exhaustion of lower-level remedies.

appear. In fact, the "intensely practical considerations . . .[12] which emerge from the intricate relationship between the duty of fair representation and enforcement of collective bargaining contracts," 389 U.S. at 183, tip the balance the other way.

This distinction (and possible conflict) between the general duty of fair representation and the requirement of due process at a hearing was recognized in *Humphrey v. Moore*, 375 U.S. 335, 349 (1964):

> Even though the union acted in good faith . . . were the . . . employees, if the union was going to oppose them,[13] deprived of a fair hearing by having *inadequate representation*[14] at the hearing? (emphasis added).

The reposing of considerable discretion in the union for grievance handling is a necessary incident of the statutory scheme of labor-management relations; nevertheless the potential for disaffection among the rank and file is clear. This disaffection may be alleviated by giving the employee a voice, through his chosen counsel, in the arbitration. The reasons given in *Vaca* (and in the Court of Appeals' opinion herein) for subordinating the interest of the individual no longer apply; to the contrary, if there are differences between the employee and his union, it is most appropriate that they be aired at the adversary, judicial-type proceeding before an impartial tribunal (the union, of course, still represented).

Allowing independent representation of the employee is more than a palliative—it is due process. Further, there is a

[12]The elided phrases indicate a slighdy different context from the use of the quotation here; nevertheless it aptly describes the present situation.

[13]Here the Union did not unequivocally advocate full relief for the 16 employees who were not reinstated. (R. 33).

[14]Here Employees alleged that they were "inadequately represented." (R. 18, 60).

widening perception of a growing identity of interest between unions and management, *cf. Glover v. St. Louis-S.F. Ry.*, 89 S. Ct. 548 (1969), which may require increasing attention in the development of the federal "common law" of labor relations. The carefully wrought structure of federal labor law must surely crumble if the members come to regard their unions as unassailable monoliths. It would seem that our courts, imbued with the principles of the Declaration of Independence and the Bill of Rights, should hesitate to subordinate the interests of the individual to the "interests of the group" (3a), except upon a showing of necessity.

Nor is the problem merely one of form—despite the summary treatment below the record suggests that the precipitating incident, an unauthorized work stoppage, generated an unavoidable conflict of interest on the part of the Unions. Punishment of wildcat strikers serves the Unions' interest in maintaining internal discipline and living up to the spirit of the no-strike clause, thus maintaining their credibility at the bargaining table. But when, in furtherance of their duty of fair representation, the Unions brought the Employees to the arbitration (*i.e.*, adversary, quasi-judicial), stage, they were entitled to a vigorous advocate unhampered by divided loyalties. This is the opposite of *NAACP v. Button*, 371 U.S. 415, 443 (1963), where "the aims and interests of NAACP have not been shown to conflict with those of its members and nonmember Negro litigants . . . ." The Employees no doubt felt that they had retained able counsel who, in his presentation of evidence and general handling of the proceedings, would have been of "inestimable value" *cf. Reynolds v. Cochran*, 365 U.S. 525 (1961).

IV.

CERTIORARI SHOULD BE GRANTED TO CORRECT THE MANIFEST ERROR OF THE LOWER COURT.

There remains a problem in the Court of Appeals' interpretation of the record which merits independent consideration. The court found that (a) "appellants were represented in good faith . . . ." (4a), and (b) "indeed the representation was adequate" (*id.*). The first finding, standing alone, would be at best tenuous, as all the court had to go on was its interpretation of the word "inadequate" in the motions to intervene[15] (R. 18, 60). There was no possible way, however, that the court could have known whether the representation was "adequate"—there is absolutely no record on the question except the allegation to the contrary; thus the validity of the first conclusion of the fact is drawn into further question. Correction by this Court is called for when a court of appeals approves a district court disposition made without findings or conclusions, and then proceeds to make

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[15]Consideration of the text of the arbitrator's decision (R. 22-60) could not be helpful as it of course could not shed light on what may *not* have been presented to the arbitrator nor could it have properly suggested alternative means of presentation. Performance could not have been evaluated even from the transcript of the arbitration proceedings as it is not in the record.

its own findings with no basis in the record. *Cf. Thompson v. City of Louisville*, 362 U.S. 199 (1960).

Respectfully submitted,

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APPENDIX

IN THE

United States Court of Appeals

FROM THE FIFTH CIRCUIT

No. 26051

JERRY J. ACUFF, ET AL.,

Appellants,

versus

UNITED PAPERMAKERS AND PAPERWORKERS, AFL-CIO, ET AL.,

Appellees.

Appeal from the United States District Court for the Southern District of Alabama

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(November 27, 1968)

Before BROWN, Chief Judge, RIVES and McENTEE,* Circuit Judges.

McENTEE, Circuit Judge: This is an appeal from the denial of a motion to intervene in a suit to compel arbitration brought under § 301 of the Labor Management Relations Act. 29 U.S.C. § 185.

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*From the First Circuit, sitting by designation.

During November 1966 an unauthorized work stoppage occurred at the plant of the Scott Paper Company, (the Company) in Mobile, Alabama. As a consequence the Company discharged some sixty-three employees a few weeks later. After the Company refused the Union's demand to arbitrate these dismissals certain affiliates of the AFL-CIO (the Union) brought this suit to compel arbitration.[1] Eventually the Company entered into a stipulation with the Union to arbitrate; whereupon the district court ordered the parties to proceed to arbitration but retained jurisdiction over the cause.

The arbitrator denied the grievance of sixteen employees because of their conduct in connction with the illegal strike. He further ordered that the discharge of the other employees be reduced to disciplinary layoff and each such employee was reinstated without loss of seniority but with no back pay. After the issuance of the arbitrator's award, the employees whose grievances were denied entirely and certain of those whose grievances were denied in part filed motions to intervene, together with complaints and motions to vacate the arbitration award.[2] The district

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[1] According to the current collective bargaining agreement, the Union was the exclusive representative of all production and maintenance employees; strikes and lock-outs were prohibited disputes or complaints were to be settled by arbitration.

[2] In their motions to intervene the employees invoked Fed. R. Civ. P. 24(a) "in order to assert the claim set forth in their proposed complaint." The complaint in turn suggests that the action arises under 9 U.S.C. § 10. This section, however, speaks of vacation of an award "upon the application of any party to the arbitration." Since the Union and the Company, not the em

court denied the motions to intervene and this appeal followed.

The issue in this case is fundamental, yet simple. In order to effectuate the purposes of the labor statutes employees are empowered to organize. This, of course, has resulted in enormous benefits but entails certain burdens as well. One of these is that to some extent the interests of particular individuals are subordinated to the interests of the group both at the contract negotiation stage and thereafter. *Local 12, United Rubber Workers v. N.L.R.B.*, 5 Cir., 1966, 368 F.2d 12, 17. This is necessary if a union is to function efficiently. As a result, a union may properly determine not to pursue a member's grievance to the arbitration stage at all. "If the individual employee could compel arbitration of his grievance regardless of its merit, the settlement machinery provided by the contract would be substantially undermined, thus destroying the employer's confidence in the union's authority and returning the individual grievant to the vagaries of independent and unsystematic negotiation". *Vaca* v. *Sipes*, 386 U.S. 171, 191 (1967). It would be paradoxical in the extreme if the union, which is authorized to decide whether a grievance is to be pursued to the arbitration stage at all, could not be authorized to as-

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ployees, were parties to the arbitration, this jurisdictional allegation is clearly deficient. But where intervention is as of right no independent ground of jurisdiction need be asserted. 4 J. Moore, Federal Practice 24.18, at 135-36.

The employees here seek to intervene because they claim that their "interests have and may continue to be inadequately represented by the present plaintiffs." We note, however, that there is no such allegation in their complaints.

sume full responsibility for a grievance it did pursue, without the intervention of the individual union members immediately concerned.

This is not to say, however, that we would afford no relief even if a union in refusing to pursue a grievance or in its manner of advocacy were motivated by animus against an individual union member. But a "breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." *Vaca v. Sipes,* supra at 190. Certainly this is not such a case. Nothing is alleged that plausibly suggests bad faith on the part of the Union. The Union pursued the grievance with energy and indeed, in large measure, with success. The employees cannot equate lack of complete success with bad faith any more than they could if their own lawyers had been involved.[3]

Not only were appellants represented in good faith, indeed the representation was adequate.[4] Rule 24(a),

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[3]Similarly, it is a different case if the interests of different groups of employees are in irreconcilable conflict. See Clark v. Hein-Werner Corp., 8 Wis.2d 264, 99 N.W.2d 132 (1960). Here the Union could have and, as far as the record reveals, did defend the rights of all the employees with equal zeal.

[4]We cannot accept appellants' contention that the failure of the Union to contest the arbitrator's award in the district court is conclusive of inadequate representation. The grievance procedure is designed to promote industrial harmony. Chaos rather than harmony would result if the Union were compelled under the guise of "adequate representation" to pursue every grievance to arbitration and to challenge every less than completely favorable arbitrator's award in the district court.

however, relied on by appellants, specifies that there can be no intervention as of right if the applicant's interest is adequately represented by existing parties. See *Sam Fox Publishing Co. v. United States*, 366 U.S. 683, 688 (1961).[5]

Further, rule 24 in no way speaks to the matter *sub judice*. The collective bargaining agent is the exclusive representative of the unit. See 29 U.S.C. § 159(a). Thus, cases such as this differ entirely from situations in which intervention is ordinarily appropriate. The right to abitration is an incident not of the employment relationship as such but of the collective bargaining relationship. See *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960). Under this agreement it is the Union and the Company that have the right to demand arbitration. Thus, they have the right to conduct the arbitration as well.

APPEAL DISMISSED.

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[5]Cf. St. Helena Parish School Board v. Hall, 5 Cir., 287 F.2d 376, cert. denied, 368 U.S. 830 (1961). In that action by Negro students seeking an injunction against the operation of racially segregated schools, it was held that a white child had failed to make a showing that representation of his interest was or might be inadequate for purposes of intervention as or right. This case was decided before the most recent amendments to Rule 24 but we think that the same result would be required under the new language. See Hobson v. Hansen, D.D.C. 1968, 44 FRD 18, 30.

UNITED STATES CONSTITUTION

First Amendment

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Fifth Amendment

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

UNITED STATES ARBITRATION ACT
[Section 10, 9 U.S.C. § 10]

§ 10. Same; vacation; grounds; rehearing

In either of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—

(a) Where the award was procured by corruption, fraud, or undue means.

(b) Where there was evident partiality or corruption in the arbitrators, or either of them.

(c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(e) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators. July 30, 1947, c. 392, § 1, 61 Stat. 669.

NATIONAL LABOR RELATIONS ACT
[Section 9(a), 29 U.S.C. § 159]

§ 159. Representatives and elections—Exclusive representatives; employees' adjustment of grievances directly with employer

(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment.

MAR 28 1969

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1095

JERRY J. ACUFF, GARNER E. ALLEN, GEORGE J. BULLOCK, CORBETTE W. CARLISLE, C. L. CARTER, DONALD W. CARTER, GEORGE W. DEAN, DEWEY R. FAIRCLOTH, M. T. FRAZIER, A. J. GIDDENS, BOBBY HARVISON, CHARLES W. HAYS, JIMMY D. HESTER, MIKE KITTRELL, T. W. KITTRELL, PHILLIP LEE, ROBERT S. MCCOY, HERBERT RAY MEITZLER, D. W. NARAMORE, WILLIAM I. PLATT, A. C. PUGH, JR., JAMES W. RICHARDSON, L. T. ROBBINS, J. I. RUSSELL, CHARLES W. SCHULER, B. R. SINGLETARY, R. C. SKIDMORE, DONALD L. WARD, J. D. WHITMAN, BOBBY N. WHITTEN, WILLIAM A. WINTERS, *Petitioners,*

v.

UNITED PAPERMAKERS AND PAPERWORKERS, AFL-CIO; INTERNATIONAL BROTHERHOOD OF PULP, SULPHITE AND PAPERMILL WORKERS, AFL-CIO; and SCOTT PAPER COMPANY, SOUTHERN DIVISION, *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF RESPONDENTS UNITED PAPERMAKERS AND PAPERWORKERS, AFL-CIO; INTERNATIONAL BROTHERHOOD OF PULP, SULPHITE AND PAPERMILL WORKERS, AFL-CIO, IN OPPOSITION TO ISSUANCE OF THE WRIT

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IN THE

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UNITED PAPERMAKERS AND PAPERWORKERS, AFL-CIO; INTERNATIONAL BROTHERHOOD OF PULP, SULPHITE AND PAPERMILL WORKERS, AFL-CIO; and SCOTT PAPER COMPANY, SOUTHERN DIVISION, *Respondents*.

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OPINION BELOW

The Opinion of the Court of Appeals (Pet. App. 1a-5a) is reported at 404 F. 2d 169 (1968). The District Court did not render an opinion.

JURISDICTION

The decree of the Court of Appeals was entered on November 27, 1968 (Pet. App. 1a). The Petition for a Writ of Certiorari was filed on February 28, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

May individual employees obtain judicial review of a partially adverse arbitration award on grounds they were not permitted independent counsel at the arbitration hearing when their collective bargaining representative's counsel represented them and all other employees in the bargaining unit pursuant to a collective bargaining agreement making the decision of the arbitration "final and binding"?

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, et. seq.) as set forth in the appendix to the petition (p. 7a).

STATEMENT

Scott Paper Company, Southern Division (the company) and United Papermakers and Paperworkers, International Brotherhood of Pulp, Sulphite and Papermill Workers and International Brotherhood of Electrical Workers (the unions) have been parties to collective bargaining agreements since 1941 (R. 18-19).

The current contract provided that the company "agrees to and hereby does recognize the unions as exclusive representative of all production and main-

tenance employees . . . for the purpose of collective bargaining in respect to rates of pay, wages, hours of employment and other conditions of employment." (R. 22). This agreement, which prohibited strikes and lockouts, provided for arbitration of "any dispute or complaint" pursuant to the request of the company or the unions, and further provided that "the decision of the arbitrator shall be final and binding on all parties" (R. 6).

In November 1966 when the agreement was in full force and effect an unauthorized work stoppage occurred (R. 7, 23-37). During the course of this unauthorized work stoppage, the company discharged 63 employees who were members of the bargaining unit (R. 7, 10-11, 26-27). All other employees returned to work at the conclusion of the unauthorized work stoppage and the unions promptly filed grievances with the company on behalf of the 63 discharged employees. (R. 8). The company at first refused to submit the grievances to arbitration (R. 8, 11-13).

The unions, on January 31, 1967, brought an action pursuant to Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185 to compel arbitration of the 63 discharges (R. 1). Subsequently, the company entered into a stipulation with the unions to arbitrate and the District Court on May 17, 1967 ordered the parties to proceed to arbitration, but retained jurisdiction over the case.

At the hearing, the arbitrator denied the discharged employees' oral and written motions "for individual and special counsel to represent" them and the unions' counsel represented all of the employees before the arbitrator (R. 19-20).

On August 17, 1967, the arbitrator denied the grievances of 16 of the discharged employees because of their conduct in connection with the illegal strike. The remaining 46 employees were reinstated but without back pay (R. 59-60).

On November 14, 1967, the 16 employees whose discharge had been sustained by the arbitrator moved to intervene in the District Court action. Subsequently 17 employees who had been reinstated without back pay also moved to intervene (R. 18, 60). The motions for intervention sought, *inter alia,* to vacate the arbitration award (R. 62). The petitioners did not allege that the unions had breached their duty of fair representation or that the unions were guilty of fraud, misrepresentation, bad faith, dishonesty of purpose, or such gross mistakes or inaction as to imply bad faith on the part of the unions. The District Court denied the motions to intervene on January 31, 1968 without decision (R. 63).

In dismissing the subsequent appeal, the Court of Appeals concluded that the discharged employees, whose grievances were denied entirely or in part by the arbitrator, do not have the right to intervene in an action brought by their collective bargaining agent pursuant to the contract between the unions and the company. (Pet. App. 3a). After noting that the petitioners had made no allegation of bad faith on the part of the unions, the court below stated that the unions had pursued the grievances "with energy and, in large measure, with success." Since the collective bargaining agreement provided that only the unions and the company "have the right to demand arbitration," the lower court concluded that only these

two parties have the right to conduct the arbitration as well. Accordingly, the Court of Appeals dismissed the motion to intervene and to vacate the arbitrator's award (Pet. App. 5a).

ARGUMENT

1. Petitioners claim that their rights of due process were violated when the arbitrator refused to permit them to be represented at the arbitration hearing by independent counsel. They were represented, as were all of the employees, by counsel chosen by their collective bargaining agent. The unions were the exclusive representative of Acuff and his co-workers by virtue of § 9(a) of the National Labor Relations Act. The agreement between the company and the unions establishing the grievance and arbitration procedure itself resulted from their respective obligations under the Act "to promote industrial stabilization through the collective bargaining agreement." *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578 (1960). Accordingly, the Court of Appeals held that since the individual employees could not compel arbitration under the contract, they could not intervene merely because the unions were not completely successful. (Pet. App. 3a-4a).

This Court has long held that if the collective bargaining machinery is to work, unions must be free "to sift wholly frivolous grievances which would only clog the grievance process" and "to take a position on the not so frivolous disputes." *Humphrey* v. *Moore*, 375 U.S. 335, 349 (1964). Thus, while the unions are "charged with the responsibility of representing [all employees] fairly and impartially" (*Wallace Corp.* v. *National Labor Relations Board*, 323 U.S. 248, 255

(1945)) they nevertheless, of necessity, must have "discretion to make such concessions and accept such advantages as, in the light of all relevant considerations [they] believe will best serve the interests of the parties represented" (*Ford Motor Co.* v. *Huffman,* 345 U.S. 330, 337-338 (1953)). The cardinal consideration, then, is that "a wide range of reasonableness must be allowed a statutory bargaining representative in serving the union he represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion. *Ibid.,* at 338.

In this regard, the Court of Appeals cited *Vaca* v. *Sipes,* 386 U.S. 171 (1967) wherein this Court stated at p. 191:

> "If the individual employee could compel arbitration of his grievance regardless of its merit, the settlement machinery provided by the contract would be substantially undermined, thus destroying the employer's confidence in the union's authority and returning the individual grievant to the vagaries of independent and unsystematic negotiation."

In *Local Union Number 742, United Brotherhood of Carpenters and Joiners of America* v. *NLRB,* 377 F. 2d 929 (C.A. D.C. 1967) *cert. denied,* 389 U.S. 843 (1967) the Court rejected the local's contention that it was deprived of a full and fair hearing before the Board because the trial examiner failed to apprise the business agent of the probable need for counsel. The court held that there was no denial of the right to counsel, rather a choice of the local to be represented by its business agent. In the instant case, the lower court pointed out that the individual employees had

agreed to be represented by their collective bargaining agent and they can't equate "lack of complete success with bad faith anymore than they could if their own lawyers had been involved." (Pet. App. p. 4a).

2. Nor is there substance to petitioners' contentions (Pet. App. 5-93) that their asserted reasons for granting certiorari are responsive to the questions they deem raised. *Commonwealth Coatings Corp.* v. *Continental Casualty Co.*, U.S. 89 S. Ct. 337, 21 L. Ed. 2d 301 (1968), deals with the obligations of an arbitrator to disclose to the parties to a commercial dispute any business dealings on his part which might create an impression of possible bias. There is no contention here that the impartial arbitrator selected by the parties to the labor dispute was biased. The "other side of the coin" in *United Mine Workers* v. *Illinois State Bar Association,* 389 U.S. 217 (1967) and *Brotherhood of Railroad Trainmen* v. *Virginia,* 377 U.S. 1 (1964) would be turned up if the unions, having provided counsel for their members' use in personal and private litigation, were to insist that they utilize such counsel, and none other, in their personal and private litigation. That is not this case.

3. This Court has dealt at length with the finality to be accorded arbitration awards which have been reached pursuant to collective bargaining contract provisions which make such arbitration "final and binding" upon the parties to the award: it is final and binding upon the parties, just as the contract says it is. *General Drivers, Warehousemen and Helpers, Local Union No. 89* v. *Riss and Company,* 372 U.S. 517 (1963).

The contract is equally binding on employees. For example, it is settled that a discharged employee may

not maintain an action against an employer under Section 301 to contest his discharge after an arbitrator's adverse decision under a contract making that decision "final and binding." *Miller* v. *Spector Freight Systems,* 366 F. 2d (1st Cir. 1966). See also *Pulp, Sulphite and Papermill Workers, Local 874* v. *St. Regis Paper Co.,* 362 F. 2d 711 (5th Cir. 1966). In this instant case, similarly, the contract provided that the decision of the arbitrator was "final and binding." (R. 6).

Moreover, there is no need to consider whether such cases as *Vaca* v. *Sipes,* 386 U.S. 171 (1967) open rights to employees which are not open to courts to reweigh the merits of a grievance. (Pet. App. 9-11). *Cf. United Steelworkers of America* v. *American Manufacturing Co.,* 363 U.S. 564, 567-568 (1960).

Although grievants are not foreclosed from seeking further relief from the National Labor Relations Board, the Board will defer to an arbitrator's award "unless it clearly appears that the arbitration proceedings were tainted by fraud, collusion, unfairness, or serious procedural irregularities or that the award was clearly repugnant to the purposes of the Act." *International Harvester Co., Indianapolis Works,* 138 NLRB 923, 927[1], *affirmed, Thomas D. Ramsey* v. *N.L.R.B.,* 327 F. 2d 784 (7th Cir. 1964), *cert. denied,* 377 U.S. 1003 (1964). In that case the Board deferred to an arbitrator's award based on a hearing of which the affected employee and petitioner had had no notice and had not appeared because "Experience has demonstrated that collective-bargaining agreements that provide for final and binding arbitration of griev-

[1] Cited with approval in *Carey* v. *Westinghouse Electric Corp.,* 379 U.S. 261 (1963).

ance and disputes arising thereunder, 'as a substitute for industrial strife,' contribute significantly to the attainment of [the Act's] statutory objective." In affirming, the Court found that "there is no statutory or constitutional right of an employee to be present at an arbitration hearing." 327 F. 2d at 787.

4. The allegation that the representation was inadequate is supported solely by the fact that the representation was not by counsel chosen by the individuals affected by the proceeding. Under the circumstances, this fails to establish manifest error by the lower Court. Nor does the fact that the representative only partially secured the relief sought establish inadequate representation (Pet. App. 4a).

CONCLUSION

The petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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March 1969

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1968

NO. 1095

Jerry J. Acuff, Garner E. Allen, George J. Bullock, Corbett W. Carlisle, C. L. Carter, Donald W. Carter, George W. Dean, Dewey R. Faircloth, M. T. Frazier, A. J. Giddens, Bobby Harvison, Charles W. Hays, Jimmy D.Hester, Mike Kittrell, T. W. Kittrell, Phillip Lee, Robert S. McCoy, Herbert Ray Meitzler, D. W. Naramore, William I. Piatt, A. C. Pugh, Jr., James W. Richardson, L. T. Robbins, J.I. Russell, Charles W. Schuler, B. R. Singletary, R. C. Skidmore, Donald L. Ward, J. D. Whitman, Bobby N. Whitten, William A. Winters,

Petitioners,

v.

United Papermakers and Paperworkers, AFL-CIO; International Brotherhood of Pulp, Sulphite and Papermill Workers, AFL-CIO; and Scott Paper Company, Southern Division,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT, SCOTT PAPER COMPANY, SOUTHERN DIVISION IN OPPOSITION

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1968
No. 1095

JERRY J. ACUFF, et al.,
Petitioners,

Vs.

UNITED PAPERMAKERS AND PAPERWORKERS, AFL-CIO, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT, SCOTT PAPER COMPANY, SOUTHERN DIVISION, IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals for the Fifth Circuit is reported at 404 F. 2d 169 (App. 1a, of Petition). No opinion was rendered by the District Court, but the Court order denying intervention was entered on January 31, 1968 (R. 63).

JURISDICTION

Respondent, Scott Paper Company, is satisfied that jurisdiction is conferred by 28 U.S.C. § 1254(1). The United States Court of Appeals entered judgment on November 27, 1968.

QUESTIONS PRESENTED

1. Do grievants, whose rights are regulated by the terms of a collective bargaining agreement, have an unqualified Constitutional right to be represented at an arbitration by counsel of their own choosing where there is no claim that representation by the exclusive bargaining representative was arbitrary, discriminatory, or in bad faith?

2. Do unsuccessful grievants, in an arbitration conducted under the terms of a collective bargaining agreement, have a right to intervene for the purpose of setting aside the arbitration in a suit brought pursuant to Section 301 L.M.R.A., 29 U.S.C. §185, to compel arbitration, where the arbitration has been concluded and the grievants present no claim that their representation was arbitrary, discriminatory, or in bad faith?

3. Was the Petition timely filed within the meaning of the rules of the Supreme Court?

STATUTES INVOLVED

The provisions of the Labor Management Relations Act, §301, 29 U.S.C. §185, are set forth in Appendix A hereto.

STATEMENT

On January 31, 1967, the United Papermakers and Paperworkers and International Brotherhood of Pulp, Sulphite and Paper Mill Workers, both duly designated representatives of employees at Scott Paper Company, filed a complaint in the United States District Court for the Southern District of Alabama seeking to compel arbitration of grievances arising out of the discharge of certain employees for engaging in a wildcat

strike during November, 1966. (R. 1-13). After filing a Motion to Dismiss (R. 13, 14), Scott Paper Company entered into a stipulation with the unions to arbitrate the grievances, and an impartial arbitrator was selected by the parties. (R. 14-16). Upon the filing of the Stipulation the Court entered an order directing arbitration on May 24-26, 1967. (R.17-18).

Arbitration of the grievances was held on May 24-27, 1967, and a decision rendered by the Arbitrator on August 17, 1967. (R. 21-60). Exhibit A to the original Complaint (R. 10) is a copy of the Collective Bargaining Agreement and provides that "the decision of the arbitrator shall be final and binding on all parties." (R. 6).

On November 14 and 15, 1967, certain employees filed Motions to Intervene in the action (R. 18,60) and attached thereto proposed complaints. (R. 19, 61). Applicants for intervention alleged jurisdiction of the Court under Title 9, U.S.C. §10, stating that the arbitrator denied in whole and in part the grievances of the employees. The complaints also alleged that the arbitrator denied the employees' written and oral motions "...for individual and special counsel to represent..." them and were only allowed representation by union counsel (R. 19,62). The employees sought to have the award vacated and to have a rehearing with special counsel to represent the employees. (R. 20,62).

REASONS FOR REFUSING THE WRIT

This case presents no compelling issue for resolution by this Court since this decision is in full accord with national labor policy as enunciated by both Congress and this Court's decisions. The Court of Appeals in its decision dismissing the appeal from the order of the District Court denying Petitioners' Motions to Intervene simply implemented that policy. The issue

sought to be raised by Petitioners finds no factual support in the record but is a pure question of law: Does a grievant in a labor arbitration, absent an allegation of arbitrary, discriminatory, or bad faith action by his collective bargaining representative, have the constitutional right to be represented by counsel of his own choosing to the exclusion of his certified representative?

This Court in *Vaca v. Sipes*, 386 U.S. 171 (1967), answered this question negatively. Thus, the decision of the Court of Appeals is correct. Neither a conflict of decisions nor an important federal question is presented for review.

The decision below is correct.

a. Right to Counsel

In dismissing the appeal from the district court's order the court of appeals decided that from the record before it, there was no support for a claim of arbitrary, discriminatory, or bad faith action on the part of the certified bargaining representative and Petitioners had shown no basis to support intervention as of right, Rule 24, F.R. Civ. P.

The logic of the opinion of the Court of Appeals is unassailable. Reasoning from the proposition that since an employee cannot "compel arbitration" regardless of the merit of his grievance, *Vaca v. Sipes, supra*, "it would be paradoxical in the extreme if the union could not be authorized to assume responsibility for a grievance it did pursue, without the intervention of the individual union members immediately concerned." 404 F. 2d at 171.

Collective bargaining with the certified representative does

not come to an end with the negotiation of the agreement, but continues on to encompass the grievance procedure. *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960). Thus, the duty imposed on an employer to bargain only with the certified representative continued through to arbitration and the employer in meeting this obligation must arbitrate those grievances called for in the collective bargaining agreement. Scott Paper Company fulfilled this obligation, as did the Unions, when they arbitrated the grievances of Petitioners.

Petitioners seek to place the role of collective bargaining, and specifically arbitration, in the context of the normal contractual relationship between parties. But, as was pointed out in the *Steelworkers* case, *supra*, "this is not true of the labor agreement." 363 U.S. at 580. Every labor agreement is subject to federal regulation. An employee's individual rights are subordinated to the terms of the agreement reached between his representative and the employer, "for arbitration is a matter of contract...." *Id.* at 582.

It is not so simple to say that an employee has a right to counsel of his own choosing during the grievance procedure. To accept this postulate, as stated by Petitioners, is to ignore the entire history of the collective bargaining process which has fashioned the labor policy of this nation.

Steel v. Louisville & N.R.Co., 323 U.S. 192 (1944) recognized the reduction in individual rights where the collective bargaining process is brought into play. Admittedly, the actions of the union in its role as exclusive representative are not unlimited, *Vaca v. Sipes, supra*, and the representative is required to fairly represent its membership. *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953).

Inevitably differences arise in the manner and degree to

> which the terms of any negotiated agreement affect individual employees and classes of employees. The mere existence of such differences does not make them invalid. The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion. 345 U.S. at 338.

Does the record present any question of arbitrary, discriminatory or bad faith action by the Unions? Nothing in the record,either before or during the arbitration, reveals any such claim. It was only after the decision of the arbitrator was rendered do we have any *suggested* claim of arbitrary, discriminatory or bad faith action by the Unions, and then only by tracking the language of Rule 24 (a) F.R. Civ. P., by utilizing the words of the statute -- inadequate representation, and this only is found in the Motions to Intervene. On pages 18 and 60 of the Record, in Petitioners' Motions to Intervene they allege that "...the Applicants' interests have and may continue to be inadequately represented by the present plaintiffs and the Applicant will or might be bound by the final disposition or confirmation of the arbitration action herein." Rule 24(a)(2) F.R. Civ. P. provides:

> (a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action . . . . (2) When the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

There is no allegation in the *complaint* for intervention that the Unions failed to act in good faith or without an honest purpose. The sole claim in the *complaint* is that Petitioners were denied the right to special counsel.

The question of right to individual counsel was considered in *Bailer v. Local 470, Teamsters*, 400 Pa. 188, 161 A. 2d 343 (1960) where an employee requested that he be allowed to have his own counsel represent him. His complaint alleged a breach of the union's obligation of good faith representation. In disposing of this contention the Court stated:

> In commissioning the appellee Local as his bargaining agent in negotiations with the employer Corporation, appellant has entrusted certain responsibilities to the Local, one of which is to represent the appellant at grievance proceedings. Moreover, under the terms of the applicable collective bargaining agreement, the appellee Local is the party specifically designated to bring employee complaints before the arbitrator. Were each aggrieved employee permitted to be represented at an arbitration by private counsel who has the right to question witnesses and otherwise participate fully in the proceedings, the Local, as a trustee representative, would be effectively unable to perform its duty. Union officials and private counsel might well be at complete loggerheads over what witnesses to present, in what order to present them, the efficacy of cross-examination of a particular witness, or over any one of the myriad decisions that enter into the conduct of a trial proceeding. Moreover, as a statutory bargaining representative under the Taft-Hartley Act, the appellee Local must at all times act in in the interests of all those within the shelter of its protection....Therefore, on many occasions the outlook

with which private counsel and union representatives would approach a policy decision in the course of conducting a trial might be radically at variance. It was to forestall this type of conflict that the Corporation agreed to negotiate on grievances solely with union representatives. If the appellee Local had granted the appellant's request, it would have been in breach of its own obligations under the collective bargaining agreement. We hold that the denial of such a request does not in any way indicate a breach of duty on the part of the appellee Local.

Vaca teaches that an employee has no absolute right to compel arbitration of his grievance. 386 U.S. at 191. Surely if an employee has no absolute right to compel arbitration, he has no absolute right to have special counsel. If such a right existed would we not have a return of the "...individual grievant to the vagaries of independent and unsystematic negotiation."? 386 U.S. at 191.

Commonwealth Coatings Corp. v. Continental Gas Co., U.S. ,89 S. Ct. 337 (1968) does not dictate a differing result. It requires impartiality in arbitration. But this is nothing more than should be required and fully comports with traditional concepts of justice. However, the traditional concepts of justice applied in criminal cases may be different from those applied in civil litigation, just as the rules governing commercial contracts differ from those negotiated within the framework of the collective bargaining process.

No claim is made that the Unions did not represent all discharged employees equally and impartially so that no question is presented involving antagonistic claims between two groups of employees. Petitioners contend that since the

arbitration proceeding is "insulated from appellate review," they must be allowed to "use their own counsel." (Petition, 8). In fact the proceeding is not insulated from review and Petitioners needed only to show that the Unions had in fact acted arbitrarily, discriminatory, or in bad faith. This they failed to do.

Petitioners argue that the First Amendment to the Constitution as expressed in *U.M.W. v. Illinois State Bar Ass'n*, 389 U.S. 217 (1967) (Petition, 8), guarantees their right to be represented by counsel of their own choosing. But any rights found abridged in that case do not carry over to the instant case. The *U.M.W.* case as well as *Railroad Trainmen v. Virginia*, 377 U.S. 1 (1964), involved action to limit the unions from selecting or recommending counsel to represent their membership. Thus, in balancing state interests against rights guaranteed by the First Amendment, the Court found that State interest must yield. In balancing the right to counsel as against the Union's right to control the arbitral process, the individual right must yield. To preserve industrial harmony the employees' right to chosen counsel must yield to the paramount right of representation by the bargaining representative. *Local 12, U.R.W. v. N.L.R.B.*, 386 F.2d 12 (5th Cir. 1966). The choice again must be made in implementing national labor policy.

> The facts of this controversy once again present the critical challenge of striking a meaningful balance, consistent with existing labor policy, between individual employees rights and the continued effectiveness of the collective bargaining process. *Id.* at p.16.

Petitioners agree with the rationale of *Vaca* but contend that its application stops when the parties reach the stage of

arbitration. It is submitted that this attempted application is wholly erroneous because the grievance process does not cease at that point. The reasons given in *Vaca* for allowing a union to settle grievances short of arbitration, and set forth in footnote 11 on page 9 of the Petition, are just as applicable and probably more important once the matter reaches arbitration. To illustrate the burden which could be placed upon the arbitration process if Petitioners' contentions were accepted it is only necessary to consider the effect of each individual grievant in this case being represented by his chosen counsel. In this case there could have been 63 attorneys representing 63 grievants, not to mention counsel for the Unions. "This would greatly increase the cost of the grievance machinery and could so overburden the arbitration process as to prevent it from functioning successfully." *Vaca v. Sipes, supra* at 192.

Humphrey v. Moore, 375 U.S. 335 (1964) does not require anything more than *Vaca*, and expressly recognizes the right of a union to control the grievance process subject to good faith and honesty of purpose.

> As far as this record shows, the union took its position honestly, in good faith and without hostility or arbitrary discrimination....

This finding was similarly present in the court of appeals holding that "nothing is alleged that plausibly suggests bad faith on the part of the union....", 404 F. 2d at 171, and Petitioners "...have not yet suggested what they could have added to the hearing by way of facts or theory if they had been differently represented." *Humphrey v. Moore*, 375 U.S. at 350.

Petitioners question the holding of the court of appeals that the representation of Petitioners was adequate, 404 F. 2d

at 171, on the theory that the record was devoid of anything showing adequacy; the only reference in the record being the word "inadequate" in the Motions to Intervene. On the other hand, Petitioners would have this Court enter a decision, remanding the case to the court of appeals on the basis of inadequate representation by its exclusive bargaining representative on the basis of a record that is just as barren of any allegation, much less fact, that these representatives did not honestly, impartially and in good faith present the grievances of these employees.

b. Right to Intervene

Petitioners sought intervention as of right under Rule 24(a), F. R. Civ. P. almost 90 days after the rendition of the arbitrator's award. The original suit to compel arbitration was filed in the District Court on January 31, 1967. The unions and Scott Paper Company agreed to arbitrate and on May 17, 1967 the Court ordered arbitration to proceed on May 24, 1967. At no time subsequent to January 31, 1967, through the entering of the award, did Petitioners attempt to intervene to claim they were not adequately represented by the unions. After entry of the award Petitioners claim in their motions that they "have and may continue to be inadequately represented" by the unions.

Unquestionably, the motions to intervene were not "timely". Intervention of right requires a "timely application." It was only after the adverse award that Petitioners brought to the Court's attention their claim of "inadequate representation" by the Unions. As was pointed out in *S.E.C. v. Bloomberg*, 299 F. 2d 315 (1st Cir. 1962), this is not permissible.

The determination of whether a petition is timely involves

> various competing considerations, not the least of which is whether the applicant was in a position to seek intervention at an earlier stage. See, e.g., American Brake Shoe & Foundry Co. v. Interborough Rapid Transit Co., 112 F. 2d 669 (2 Cir. 1940); Mullins v. DeSoto Securities Co., 2 F.R.D. 502 (W. D. La. 1942), appeal dismissed 136 F. 2d 55 (5 Cir. 1943). We believe that in this case with the position of the Commission already firm and having brought the implications thereof to the attention of the court at the July 26 hearing, it was clearly in a position to seek -- and in our view should have sought -- intervention long before September 8. Procrastination is never admirable; where, as here, the fate of a corporate reorganization hangs in the balance, it is intolerable. Thusly viewed, we cannot say that the district court abused its discretion in denying the Commission's motion to intervene.

Here the employees procrastinated for ten months, and then only sought intervention when the suit was moot. Here the entire arbitration process is concluded.

The only "interest" in the arbitration is held by the unions and the company as parties to the collective bargaining agreement. *Republic Steel Corp. v. Maddox,* 379 U.S. 650 (1965); *Black-Clawson Co. v. I.A.M., Lodge 355,* 313 F. 2d 179 (2d Cir. 1962). The employees were and are represented by their unions who did protect their interest in the arbitration. No claim is made that the interest of the union was antagonistic to the interests of the employees. Intervention under Rule 24(a) does not afford these employees the relief they seek, since they do not come within its terms.

c. Timely filing of the Petition.

Respondent, Scott Paper Company,shows unto the Court

that the judgment of the Court of Appeals for the Fifth Circuit was entered on November 27, 1968, with opinion of the same date. The petition was filed on February 28, 1969, more than 90 days from entry of the judgment by the Court of Appeals. The period for applying for a writ of certiorari has not been extended by a justice of this Court, Title 28, U.S.A. §2101(c) and Rule 22 Supreme Court Rules. Petitioners application for a writ of certiorari is not timely and should be denied.

CONCLUSION

The decision of the Court of Appeals involved resolution of two issues: (1) Petitioners had made no allegation or showing of arbitrary, discriminatory or bad faith action on the part of their exclusive bargaining representative, and (2) Petitioners showed no right to intervene under Rule 24(a), F. R. Civ. P. No compelling Constitutional issue is involved requiring resolution by the Court, the issue having been settled in previous decisions, which the Court of Appeals correctly applied in dismissing the appeal.

It is respectfully submitted that the questions here raised by Petitioners are not of the importance to warrant review by this Court and the Petition for Writ of Certiorari should be denied.

T. K. JACKSON, JR.
Counsel for Respondent
Scott Paper Company

Marshall J. DeMouy
John Grow
Armbrecht, Jackson & DeMouy
1101 Merchants National Bank Building
Mobile, Alabama 36601
Of Counsel

PROOF OF SERVICE

I, T.K. JACKSON, JR., the attorney for the Respondents herein and a member of the Bar of the Supreme Court of the United States, hereby certify that on the day of , ,1969, I served a copy of the foregoing brief for Respondents in opposition on Jerry J. Acuff, et al., Petitioners herein, by mailing a copy of the same in a duly addressed envelope, with first class postage prepaid, to Melvin L. Wulf and Eleanor Holmes Norton, counsel for Petitioners, at their office address, 156 Fifth Avenue, New York, New York, and to Reber Boult, Jr. and Charles Morgan, Jr., attorneys for the Petitioners, at their office address, 5 Forsyth Street, Atlanta, Georgia, and to Otto E. Simon, attorney for Petitioners, at his office address, Simon & Wood, 1010 Van Antwerp Building, Mobile, Alabama and to Warren Woods, attorney for Respondent Unions, at his office address, Perpetual Building, 1111 E. Street, N.W., Washington, D.C., and to Willis C. Darby, Jr., attorney for Respondent Unions, at his office address, 154 St. Louis Street, Mobile, Alabama.

T. K. JACKSON, JR.
Counsel for Respondents
1101 Merchants National Bank
Building
Mobile, Alabama 36601

APPENDIX A

Section 10 Title 9 U.S.C.

In either of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration --

(a) Where the award was procured by corruption, fraud, or undue means.

(b) Where there was evident partiality or corruption in the arbitrators, or either of them.

(c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(e) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.

Section 1254 (1) Title 28 U.S.C.

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

Section 2102 (c) Title 28 U.S.C.

(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

Section 185(a) Title 28 U.S.C.

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

APR 11 1969
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 1095

JERRY J. ACUFF, GARNER E. ALLEN, GEORGE J. BULLOCK, CORBETTE W. CARLISLE, C. L. CARTER, DONALD W. CARTER, GEORGE W. DEAN, DEWEY R. FAIRCLOTH, M. T. FRAZIER, A. J. GIDDENS, BOBBY HARVISON, CHARLES W. HAYS, JIMMY D. HESTER, MIKE KITTRELL, T. W. KITTRELL, PHILLIP LEE, ROBERT S. McCOY, HERBERT RAY MEITZLER, D. W. NARAMORE, WILLIAM I. PLATT, A. C. PUGH, JR., JAMES W. RICHARDSON, L. T. ROBBINS, J. I. RUSSELL, CHARLES W. SCHULER, B. R. SINGLETARY, R. C. SKIDMORE, DONALD L. WARD, J. D. WHITMAN, BOBBY N. WHITTEN, WILLIAM A. WINTERS,

Petitioners,

v.

UNITED PAPERMAKERS AND PAPERWORKERS, AFL-CIO; INTERNATIONAL BROTHERHOOD OF PULP, SULPHITE AND PAPERMILL WORKERS, AFL-CIO; and SCOTT PAPER COMPANY, SOUTHERN DIVISION,

Respondents.

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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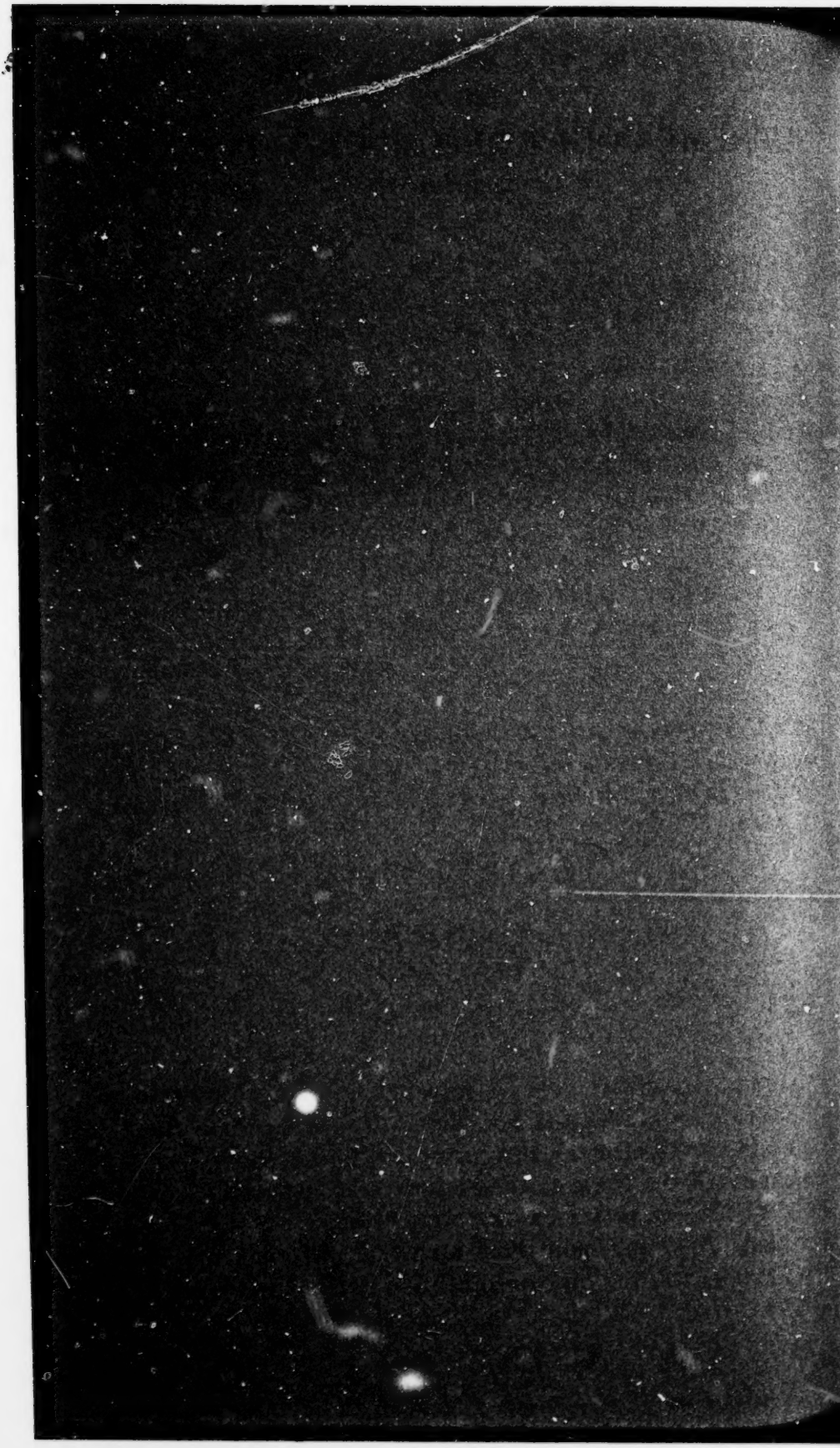
Washington, D. C. · PHONE EXECUTIVE 3-0000



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Respondents.

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

Respondent Scott Paper Company has, in its Brief In Opposition, conceded that jurisdiction is conferred on this Court (Scott Brief at 1), but presented the question of the timeliness of the filing of the Petition for Certiorari (Scott Brief at 2). It is argued that the Petition was filed on February 28, 1969 more than ninety days from entry of the judgment below on November 27, 1968. (Scott Brief at 13)

As shown by the affidavits filed herewith and printed in the appendix hereto, forty printed copies of the Petition for Certiorari were lodged with the office of the Clerk of this Court during regular business hours on February 25, 1969, the ninetieth day after the entry of judgment. The difficulty arose in connection with the filing of the Certified Record. This had been transmitted to the printer, Thiel Press of Washington, D.C., along with the copy for the printing of the petition and with the request that it be filed with the petition and docketing fee. (Exh. to Affidavit of Counsel, 6a) The printer however did not so deliver the record. (Affidavit of John K. Brewer, 2a)

Counsel became ill on February 24, 1969 and because of this incapacity did not make a post-filing confirmation of such details on the 25th. He had however been assured by the printer that all was in order and all deadlines as to filing and service would be met. (Affidavit of Counsel, 5a)

Respondents were not prejudiced, as service was made pursuant to this Court's rule 33 at the time of the filing. (Affidavit of John K. Brewer, 6a) The record consists only of the printed record used in the Court of Appeals for the Fifth Circuit with the addition of that court's opinion and judgment. Respondent Scott Paper Company is represented by Counsel from the same law firm as in the district court and court of appeals and therefore presumably had a copy of the printed record.

Whatever the justification for "depriving plaintiffs of their lawsuits . . . merely because their lawyers have failed to file some paper within the time required by Court rules" *Morris v. Florida*, 89 S. Ct. 84 (1968) (Black, J., dissenting), petitioners (plaintiffs below) should not be deprived of their lawsuit when the negligence is yet a step more remote—a printer's oversight. Moreover, the oversight did not prejudice respondents, and the problem probably

would not have arisen had petitioners' lawyer not been ill.[1]

See *Taglianetti v. United States*, 37 U.S.L.W. 3353 n. 1 (U.S. March 24, 1969):

> Although this petition for certiorari was not filed within the 30 days allowed by the Court's Rule 22(2), the time limitation is not jurisdictional, *Heflin v. United States*, 358 U.S. 415, 418, n. 7 (1959), and does not bar our exercise of discretion to consider this case.

The ninety day period provided by 28 U.S.C. 2101(c) (reproduced and cited as § 2102(c) in the Scott brief at 16) within which a "writ of certiorari . . . shall be . . . applied for . . ." may be jurisdictional,[2] but, by parity of reasoning with *Taglianetti* and *Heflin*, the provision of Supreme Court Rule 22(3)[3] requiring the filing of certified record with the petition is not jurisdictional. That is, if 28 U.S.C. § 2101(d) (delegating to the Court the authority to set the time for applying for certiorari in criminal cases) does not make

---

[1] And *cf.* the practice of the office of the Clerk of this Court of not submitting forma pauperis petitions in which the United States is respondent until after the Solicitor General's brief in opposition is filed, which brief, counsel is informed, is often not filed until several weeks beyond the thirty-day period provided by Supreme Court 24(1).

[2] The inconsequential nature of the late filing of the appendix is indicated by the fact that respondent does not argue that the defect is jurisdictional.

[3] "A petition for writ of certiorari in all other cases shall be deemed in time when it and the certified record required by Rule 21 are filed with the clerk within the time prescribed by law."

Rule 22(2) jurisdictional, then § 2101(c) does not make Rule 22(3)'s enumeration of documents to be filed with the petition jurisdictional.

Respectfully submitted,

REBER F. BOULT, JR.,
CHARLES MORGAN, JR.,
5 Forsyth Street, N.W.
Atlanta, Georgia 30303

OTTO E. SIMON,
SIMON & WOOD,
1010 Van Antwerp Bldg.
Mobile, Alabama

Attorneys for Petitioner.

Of Counsel:
MELVIN L. WULF,
ELEANOR HOLMES NORTON,
156 Fifth Avenue
New York, New York 10010

APPENDIX

[Caption Omitted in Printing]

AFFIDAVIT

John K. Brewer, Production Manager of Thiel Press, Inc., Washington, D.C., after being duly sworn, deposes and says:

Following telephone conversation with Mr. Reber Boult, Atlanta, Georgia, on February 24, 1969, we dispatched messenger to pick up at Air Express Terminal, National Airport, Washington, D.C. carbon copy of draft of Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit in the above-captioned case. The petition was to be filed February 25, 1969, the following day. In the meantime, we received in our office by air mail, the original of the draft for the petition. In view of the stringent time requirements for the completion of the job, upon receipt of the air mail draft, our Master Job Sheet was prepared and the job immediately given to a compositor for composition. Subsequently, the air express package was brought by our messenger to the office. This package contained in addition to a carbon copy of the draft material for the petition, the Certified Record and a check for $100.00 payable to the Clerk of the Supreme Court to cover the filing fee, and a copy of letter of transmittal from Mr. Boult asking if we would file the Certified Record and pay the filing fee at the time we filed the Petition. The original of this letter of transmittal was enclosed with the air mail draft, but as we already had telephone instructions as to the time requirements for the filing of the job, the letter of transmittal was detached from the draft and placed aside at the time composition was undertaken. Upon receipt of the air express package the Certified Record and check were placed in a separate file for safekeeping and no entry was made on the Master Job Sheet relative to the filing of the Record and paying the filing fee.

Following the necessary composition and other work in connection with preparing the petition for printing, Press-room Instruction Sheet was prepared from the Master Job Sheet, with the consequent result that instructions to pay the filing fee and deliver the Certified Record with the petition were not given to the delivery unit. The Petition was delivered to the Office of the Clerk of the Supreme Court February 25, 1969, receipted copy of Certificate of Service being attached hereto. According to the messenger who effected delivery of the petition on February 25, no questions were raised nor was any comment made by the Office of the Clerk regarding the filing fee or the Certified Record.

To the best of my knowledge and recollection, on February 27, 1969, it came to my attention that the Certified Record and the filing fee had not been delivered with the petition. I then phoned the Office of the Clerk of the Supreme Court, telling them what had happened and advising them that I would have the filing fee and Certified Record delivered to that office. Delivery was made the following morning, February 28, 1969.

/s/ John K. Brewer

[Jurat Omitted in Printing]

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1968

Jerry J. Acuff, Garner E. Allen, George J. Bullock, Corbette W. Carlisle, C.L. Carter, Donald W. Carter, George W. Dean, Dewey R. Faircloth, M.R. Frazier, A.J. Giddens, Bobby Harvison, Charles W. Hayes, Jimmy D. Hester, Mike Kittrell, T. W. Kittrell, Phillip Lee, Robert S. McCoy, Herbert Ray Meitzler, D.W. Naramore, William I. Platt, A.C. Pugh, Jr., James W. Richardson, L.R. Robbins, J.I. Russell, Charles W. Schuler, B.R. Singletary, R.C. Skidmore, Donald L. Ward, J.D. Whitman, Bobby N. Whitten, William A. Winters,

Petitioners,

v.

United Papermakers and Paperworkers, AFL-CIO/International Brotherhood of Pulp, Sulphite and Papermill Workers, AFL-CIO; and Scott Paper Company, Southern Division,

Respondents.

RECEIVED
FEB 25 1969
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. _____

CERTIFICATE OF SERVICE

I certify that today February 25, 1969, I delivered (mailed) in the quantities itemized, copies of the Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit in the above-entitled case to the following counsel of record:

3 Copies: (AIRMAIL)
Marshall J. Demouy and John Grow
Armbrecht, Jackson and Demouy
1011 Merchants National Bank Building
Mobile, Alabama 33601

3 Copies: (AIRMAIL)
Willis C. Darby, Jr.
P.O. Box 2565
Mobile, Alabama 33601

3 Copies: (AIRMAIL)
Otto E. Simon
Simon & Wood
1010 Van Antwerp Building
Mobile, Alabama

3 Copies: (AIRMAIL)
Melvin L. Wulf
156 Fifth Avenue
New York, New York

Thiel Press
1422 K Street, N.W.
Washington, D.C. 20005

By _____

Sworn to before me this _____ day of _____ —

_____

_____

[Caption omitted in printing]

AFFIDAVIT OF COUNSEL

Reber F. Boult, Jr., after being duly sworn, deposes and says, as the counsel primarily responsible for preparation, printing, and filing of the petition for certiorari herein:

Charles Morgan, Jr. and I, having first been contacted by two of the petitioners, agreed on February 14, 1969 to prosecute this case in the Supreme Court. Mr. Morgan assigned to me, the obtaining and filing of the certified record, a major portion of the preparation of the petition and responsibility for the printing and filing thereof.

I thereupon instructed counsel below to arrange to have the certified record transmitted directly from the Clerk of the Court of Appeals for the Fifth Circuit to the Clerk of the United States Supreme Court. However in a telephone conversation with the Fifth Circuit Clerk's office on

another subject during the week prior to the filing deadline herein, the transmittal of the record in this case was mentioned. That office indicated a preference for sending the record to me for transmission with the petition; this was done.

Attached as an Exhibit hereto is a copy of my letter of transmittal of February 22, 1969 for the printer's copy, docketing fee, and certified record. This letter requests that the printer, Thiel Press, file the docketing fee and record with the printed petition.

On Monday, February 24, 1969 I became ill, but before leaving our office during the afternoon, I confirmed by telephone with the printer that the copy had been received and that all deadlines as to filing and service would be met. I probably would have again the next day explicitly confirmed that all such requirements had been met, but because of the continuing illness did not do so.

/s/ Reber F. Boult

[Jurat omitted in printing]

EXHIBIT TO AFFIDAVIT OF COUNSEL

The Roger Baldwin Foundation
of ACLU, Inc.

SOUTHERN REGIONAL OFFICE

5 FORSYTH STREET, NW
ATLANTA, GEORGIA 30303
(404) 524-0386

Charles Morgan, Jr.
Director

Reber F. Boult, Jr.
Staff Counsel

22 February 1969

Thiel Press
1422 "K" Street, N.W.
Washington, D.C.

RE: Acuff v. National Papermakers

Dear Mr. Thiel:

We are enclosing the copy for the petition for certiorari in this case. Please print 150 copies with white covers.

The original of the petition and the remaining portion of the appendix are enclosed herewith; a copy of the petition (without the appendix for which other arrangements can be made if the original does not arrive) and a copy of this letter are being air-expressed for delivery to your office.

The deadline for filing is Tuesday, February 25th, 1969. Please file the customary forty copies and distribute the remaining as follows:

3 copies to be served upon opposing counsel
Marshall J. DeMouy and John Grow
Armbrecht, Jackson and DeMouy
1011 Merchants National Bank Building
Mobile, Alabama 33601

3 copies to be served upon opposing counsel
Willis C. Darby, Jr.
P.O. Box 2565
Mobile, Alabama 36601

3 copies to Otto E. Simon
Simon & Wood
1010 Van Antwerp Building
Mobile, Alabama

70 copies to Melvin L. Wulf
156 – 5th Avenue
New York, New York

The remaining copies are to be sent to this office.

Since it is most certain that it will arrive by Tuesday, I am enclosing our check for the one-hundred dollar docketing fee made out to John F. Davis, Clerk, with the air-express copy as well as the certified record. We would appreciate it if you would file these with the petition. Also, please execute your usual affidavit of service for the copies that you will air mail to opposing counsel.

I will be in touch with you Monday morning by telephone to make arrangements for reading the proofs and to insure that all is in order.

Very truly yours,

/s/ Reber Boult, Jr.